

Defendants Debra Dickerson and Abdol Sardarabadi (“Defendants”) originally contracted with Tierney Construction (“Tierney”) for building a single family residence in Morro Bay. Tierney in turn retained Plaintiff Benjamin Jochim dba Ben’s Electric Company (“Plaintiff”) as a subcontractor to perform the electrical work on the residence.

Plaintiff’s Second Amended Complaint (“Second Complaint”) alleges that after defendants terminated their contractual relationship with Tierney, they and another defendant, the Majic Family Trust (another alleged owner of the residence) (“Majic”), contracted directly with plaintiff to complete the remainder of the electrical work. Plaintiff alleges breach of a written contract for additional electrical work and also breach of an oral agreement to perform “punch list” items.

Majic demurs to the Second Complaint on the grounds the Second Complaint fails to plead any facts to establish that Plaintiff and Majic had a contractual relationship. Majic contends the construction contract was between Defendants and Tierney. Consequently, Majic asserts that it had no standing to terminate the contract and that Plaintiff does not have standing to pursue his claims against Majic.¹

The standard elements for breach of contract claim are: “(1) the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) damage to plaintiff therefrom. [Citation.]” (*Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425, 434-435) Plaintiff’s allegations must be accepted as true for the purpose of ruling on the demurrer. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604)

Plaintiff specifically alleges that the construction contract between Tierney and Defendants was terminated in 2006 prior to completion of the residence. Whether or not Majic was involved or had authority with respect to the earlier contract is irrelevant. Once the contract was terminated, Defendants and Majic had the ability directly to contract with the subcontractors, including Plaintiff.

Indeed, Jochim claims that, in 2006, he directly contracted with Defendants and Majic to complete the electrical work defined in the Tierney contract. Approximately one year later, he states that he contracted with Defendants and Majic to install automated lighting and a shade system and to complete punch list items. Plaintiff alleges he supplied all of the required labor and materials, but has only received partial payment. Plaintiff seeks the remaining balance of \$28,920 from Defendants and Majic.

Relying on the exhibits attached to the Second Complaint, Majic argues that Plaintiff is “re-naming” documents to create a contractual obligation with Defendants and Majic where none exists. Majic contends that Plaintiff’s claims are actually against Tierney and not Defendants and Majic.

¹ Defendants have filed a demurrer on the same grounds, which is set for hearing on November 18, 2008.

Facts appearing in exhibits attached to the complaint are given precedence over inconsistent allegations in the complaint. (*Holland v. Morse Diesel, Int'l, Inc.* (2001) 86 Cal.App.4th 1443, 1447) The June 27, 2007 additional work authorization (Exhibit C, page 1) appears to be an addition to the Tierney contract. However, this addendum was prepared one year after the alleged termination of the Tierney contract. Also, the September 13, 2007 invoice (Exhibit C, page 2) was sent directly to Defendants by plaintiff. Plaintiff's October 15, 2007 invoice is directed to Majic and Defendants and states: "Balance due of finished electrical assumed by owner after replacing general contractor." (Exhibit B, page 2) However, the September 22, 2007 invoice for the same amount owed was billed to Tierney at a time when the contract was supposedly terminated.

Although Majic has raised viable questions contesting the veracity of Plaintiff's allegations, the attached exhibits, even if given precedence, do not clearly establish as a matter of law that Defendants and Majic had no independent contractual relationship with Plaintiff. The likelihood of Plaintiff's ability to prove his allegations is of no concern in ruling on a demurrer. (*Committee on Children's Television Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214)

Majic's demurrer is overruled. Plaintiff's request for sanctions is denied. CCP §128.5 sanctions are only applicable to cases commenced prior to 1995 and anti-SLAPP cases.